No. 83-305

In The

Supreme Court of the United States

October Term, 1983

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

ALBERT WALTER TROMBETTA, et al.,

Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEALS FIRST APPELLATE DISTRICT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the due process mandate of the 14th Amendment to the Constitution of the United States, which imposes a duty on law enforcement to preserve evidence collected as a condition to admissibility, require preservation of a breath sample in a driving under the influence of alcohol case, where law enforcement has the capability of preservation of a sample for independent analysis; where the Omicron Intoxilyzer is non-specific for alcohol; where a preservation method is approved by the State; where other preserving methods are available; where the methods of preservation are simple, physically and financially feasible, and where the test results on the preserved sample are scientifically true and will verify the accuracy or establish the inaccuracy of law enforcement testing?

2. Is there a violation of the equal protection mandate of the 14th Amendment to the Constitution of the United States, where state law does not require the preservation of a breath sample for possible retesting by a defendant who has been accused of driving under the influence of alcohol, but does require preservation of blood and urine samples for a defendant's retesting in such a situation?

3. Is there a violation of the equal protection and/or due process mandates of the 14th Amendment to the Constitution of the United States, where a person suspected of driving under the influence of alcohol, chooses a breath test from the three available choices

but is not advised by law enforcement that no retestable sample will be preserved for his later retesting so as to allow said person to exercise an informed consent to either waive the failure to preserve or to have a blood or urine test in which situation preservation is required?[1]

PARTIES TO PROCEEDINGS

Joining in the Brief in Opposition are numerous parties, all first consolidated for decision before the California Court of Appeals, First Appellate District, Division Four.

DeMeo & DeMeo and Associates by John F. DeMeo, Esq. for Respondent Albert Walter Trombetta.

Thomas R. Kenney, Esq. for Respondents Michael Gene Cox, Thomas Nelson Muldoon, Clinton James Brown, Densel Lee Furner, Patricia Jane Keeffe, Herbert John Berryessa, and James K. Schneider.

J. Frederick Haley, Esq., Mary A. Allen, Esq., and Matthew Haley, Esq. for Respondent Gregory Moller Ward.

John A. Pettis, Esq. for Respondent Gale Bernell Berry.

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[1]Although raised by Respondents below, the *Trombetta* Court did not find it necessary to resolve the second and third questions presented. If this Petition is granted, Respondents respectfully request the opportunity to again present these issues.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, for the reasons set forth herein, respectfully request this Honorable Court deny the Petition for Writ of Certiorari to the California Court of Appeals, First Appellate District.

CONSTITUTIONAL PROVISION INVOLVED

This case involves both the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution, wherein it is stated:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws."

STATEMENT OF THE CASE

Procedural Background

Prior to their consolidation by the Fourth Division of the First Appellate District of the California Court of Appeals, these cases followed diverse procedural roadways.

In the *Ward* and *Berry* cases judgments of conviction for driving under the influence of alcohol were entered in the Municipal Court. The Contra Costa County Appellate Department of the Superior Court affirmed those convictions, but this three judge panel unanimously certified the questions now before this honorable Court to the Third Division of the First Appellate District of the California Court of Appeals. That Division summarily denied transfer. Respondents Ward and Berry then petitioned the California Supreme Court for Writs of Habeas Corpus. That Court, following extensive briefing, ordered the People in Ward and Berry to show cause before the Fourth Division of the First Appellate District of the California Court of Appeals why relief should not be granted as prayed for by Ward and Berry.

In the *Trombetta* and *Cox* cases, the Municipal Court denied denied defendants' motion to suppress evidence of the intoxilyzer breath tests. The motions were based on

law enforcement's failure to save a sample. Each defendant then appealed to the Appellate Department of the Superior Court of Sonoma County, which affirmed the lower court order and certified the cases for transfer to the Fourth Division of the First Appellate District of the California Court of Appeals. That Court accepted the transfer. On December 30, 1982 all four cases were consolidated.

The Fourth Division of the First Appellate District of the California Court of Appeals (hereinafter, *Trombetta* Court), first rendered its decision on March 28, 1983. Following extensive briefing on a motion to reconsider, the *Trombetta* Court filed a modified opinion which did not change the judgment on April 27, 1983. A Petition for Hearing in the California Supreme Court was denied on June 23, 1983.

The instant Petition for a Writ of Certiorari from the April 27, 1983 decision of the *Trombetta* Court was then brought in this court.

Factual Background

Each Respondent was arrested for driving under the influence of alcohol. [Formerly, California Vehicle Code Sections 23101(a) or 23102(a); now sections 23153(a) or 23152(a), respectively.]

Each was asked to select one of three blood alcohol level tests; blood, breath or urine, pursuant to procedures outlined in California Vehicle Code § 13353(a). Because it is easiest to administer, the police officer urged the Respondents to take the breath test. Each Respondent then submitted to a breath test on the Omicron Intoxilyzer.

Had Respondent selected the blood or urine test, the California Administrative Code required the remaining portion of the sample be saved for defendant's later retesting (Title 17, California Administrative Code, § 1219.1 and § 1219.2). No similar provision is made for breath sample retention.

Consistent with their custom and practice at that time, the police officers made no attempt to and did not retain a sample of the breath. It was "conceded that no effort was made to capture breath specimens for later testing by the defense." *People v. Trombetta* (1983) 142 Cal. App. 3d 138, 143, 190 Cal. Rptr. 319, — P. 2d —.

The Respondents were not informed nor did they know that if they selected the breath test as opposed to the blood or urine test, a sample would not be retained for them.

At the time of these arrests there was available to law enforcement state approved equipment making retention and preservation of the breath sample collected simple, feasible, inexpensive, accurate and useful.

For example, the People and Albert Walter Trombetta stipulated to the following at the municipal court level in Sonoma County:

1. **At no time prior to or after the intoxilyzer test was administered to respondent did any law enforcement or peace officer advise respondent verbally or in writing that there would be no sample of his breath preserved for retesting or for any other purpose.**
2. **At the time and place of the collection of the breath sample on the intoxilyzer there was and is and had been available to the County of Sonoma**

a device approved by the Department of Health of the State of California for the collection of a breath sample for later testing.

3. In this case there was no sample collected for the purpose of later analysis.
4. The approved device which collects and captures breath samples (intoximeter field crimper-indium tube encapsulation kit) for later testing is financially feasible for the state to use and is simple to operate.
5. The approved device which collects and captures breath samples for later testing can be used at any place or location, such as at a police station or in the field.
6. The ruling of the lower court herein subject to all proper appellate review would be binding on the petitioner people and the respondent Albert Trombetta at the trial.

While Respondents below introduced evidence of several methods of preservation, including the Silica Gel Cylinders, the *Trombetta* Court focused on one, the Intoximeter Field Crimper-Indium Tube Encapsulation Kit (hereinafter referred to as the Kit).

> "This 'kit' can be used in the field to collect a breath sample which is separate from the sample collected by the intoxilyzer. The device is independent from the breath testing devices and is in effect only a breath *collection* as opposed to a breath testing device. The subject blows into an indium tube which captures the breath sample. The indium tube is a soft metal device used to capture and preserve a breath specimen for later analysis. The tube originally is in a single piece but when the sample is blown into the tube, it can be crimped to hold the breath sample in three separate compartments. These containers can then be placed in a gas chromatograph (intoximeter) device

> which will test the sample for blood alcohol content. The gas chromatograph is an approved device for blood alcohol determination; the indium tube is approved for use with the gas chromatograph if the sample is tested within 14 days of collection. (Instruments Approved for Breath Alcohol Analysis, Dept. of Health, Dec. 20, 1979.)." *People v. Trombetta* supra, 142 Cal. 3rd at 142, 143.

The accuracy of the Omicron Intoxilyzer as a test of alcohol content is subject to error because it is non-specific. Because it also registers substances other than alcohol as alcohol, such as butane, it is capable of registering false positives. The gas chromatograph machine mentioned in *Trombetta* is specific for alcohol. It will not measure any other chemical substance as alcohol. For this reason, the gas chromatograph is superior to the Omicron Intoxilyzer.

In Contra Costa and Sonoma Counties, when breath testing was done for the county by an independent laboratory, breath samples were routinely retained via the kit for a defendant who could then request a sample for independent retesting following his arrest. The retest would be done on the gas chromatograph device mentioned above. When those counties began doing their own testing, they consciously abandoned the saving and preservation of a breath sample but continued retention of blood and urine samples.

Following their arrests, all respondents requested from law enforcement a sample of their breath. None was available and their requests were denied.

REASONS FOR DENYING THE WRIT

Rule 17 of the United States Supreme Court Rules sets forth the considerations of this court governing review on certiorari. Respondents contend that none of these considerations are encountered in the Petition for a Writ of Certiorari herein.

The Trombetta decision did not decide a federal question in significant conflict with decisions of other state courts of last resort. [United States Supreme Court Rule 17.1(a)].

The Trombetta Court did not decide a federal question in a way in conflict with applicable decisions of this court. Rather, the decision is an application of principles of due process first set out in *Brady v. Maryland* (1963) 373 U. S. 83, 83 S. Ct. 1194.

The Decision Of The Trombetta Court Does Not Significantly Conflict With Decisions Of Other States On This Federal Question.

The alleged conflict between the state court decisions in the area of breath sample retention is more illusory than real. In all the cases where the court deciding the issue had an adequate record of the feasibility of retaining breath samples for later independent retesting by the defendant and the usefulness of retesting to the defendant, the courts have held that, in order to meet law enforcements' duty to preserve collected evidence under the federal due process clause, those devices which preserve a sample must be used. The decision of a state court with an adequate record before it was:

> "Although the state and municipality argued that a suitable system for the preservation of samples of

> defendants breath could not be accomplished at reasonable cost with sufficient accuracy, we conclude that the defendants in these cases have shown that the technology does exist to set a reasonable system for preserving breath samples." *Municipality of Anchorage v. Serrano* (Ak. 1982) 649 P. 2d 256, 259.

The Alaska court held retention of a sample was required.

Cases from courts of last resort of other states making similar findings regarding the ease with which the sample could be saved and the usefulness to the defendant of retaining such a sample are Arizona in the case of *Baca v. Smith* (Ariz. 1980) 604 P. 2d 617 and Colorado in *Garcia v. Dist. Court*, 21st Jud. Dist. (Colo. 1979) 589 P. 2d 924. From these findings, each of these courts held there was a due process duty to retain a sample.

Petitioner cites several decisions in support of his contention that there are other state court decisions of last resort which conflict with *Trombetta*. Review of those decisions shows that all but two do not conflict with Trombetta, and in those two, the conflict is not significant.

Four of the cases cited by Petitioner hold that no sample need be kept. In each decision, however, the court points out that the record before it was insufficient to make a determination on the feasibility and usefulness of using breath retention equipment. In the Florida decision of *State v. Lee* (Fla. App. 1982) 422 So. 2d 76 the court explained at page 78:

> "Lee, who was a moving party [seeking suppression] had the burden of making a showing on the record that there are scientifically developed means by which a breath sample can be preserved for later testing.

He failed to do so when he offered no evidence at the hearing." (brackets added)

And at footnote 5 of that decision, the court added:

"Of course, nothing we have said should be construed to indicate how we would rule upon the issue argued before us should we be presented with a case with evidence and the fully developed record ripe for decision."

And in the case of *Montoya v. Metropolitan Court* (N.M. 1982) 651 P. 2d 1260, 1261, the court held no duty to retain a sample but explained:

"That there is no substantial evidence in the record from which the trial court could find that an independent breath alcohol sample could be accurately retested after capture and preservation on the machines currently in use. Thus, there is no due process requirement that an independent breath sample be preserved as evidence in appellees' cases."

The case of *People v. Reed* (1981) 92 Ill. App. 3d 1115, 48 Ill. Dec. 421, 416 N. E. 2d 694 discussed the duty to preserve the ampoule used with a Breathalyzer. The court explained:

"The same issue was raised in *People v. Godbout* (1976), 42 Ill. App. 3d 1001, 1 Ill. Dec. 583, 356 N. E. 2d 865. That court concluded it could not determine if due process had been violated [redacted] without evidence in the record regarding the feasibility of preserved (sic) the ampoules and the potential for obtaining exculpatory evidence from preserved ampoules. Similarly, since no such evidence was offered at trial in this case, we cannot determine if this particular defendant was denied due process or if procedures in Illinois are generally violative of due process in cases of this type." Id. at 696, 697.

Also conflicting with *Trombetta*, Petitioner argues, is *State v. Newton* (S.C. 1980) 262 S. E. 2d 906 involving preservation of a Breathalyzer ampoule and simulator. Again, that court explained:

> "[A]ppellant has not attempted to show that the ampoules, if available, could be subjected to scientific retesting which would yield reliable results." Id. at 909.

These four decisions do not conflict with *Trombetta*. The *Trombetta* court had before it the record these courts tell us they did not have. If these courts did have the extensive record the *Trombetta* court had, Respondents are confident they would have come to the same holding as *Trombetta*.

Petitioner next cites as conflicting with *Trombetta*, the case of *State v. Cornelius* (N.H. 1982) 452 A. 2d 464. That case discussed the States failure, while administering a Breathalyzer test, to take an additional breath sample for defendants later independent testing. This case, except in an insignificant sense, holds exactly as did *Trombetta*.

In the majority opinion Justice Brock and Justice Bois refused to overrule that courts 1976 decision of *State v. Shutt* (1976) 116 N.H. 495, 363 A. 2d 464. The earlier decision had rejected the argument that a breath sample need be kept. The majority decision does not mention any particular breath retention or testing device but qualifies its opinion when it states:

> "The evidence before us indicates that since *Shutt* was decided, advances in technology have occurred, making it possible for the State, at reasonable expense, to take and preserve an additional breath sample or its

> functional equivalent for the defendant's later use, and for information of some value to be obtained from 'used' ampoules. We are not prepared, however, to conclude that a statute and the procedures employed in its implementation, which passed constitutional muster in 1976, have because of these technological advances become constitutionally infirm in 1982. It is sufficient to emphasize that as technological advances occur, the use of which by law enforcement authorities will better enable the State to make more meaningful and real the rights guaranteed citizens under our constitutions, the dictates of basic fairness may require that the State avail itself of such technology." Id. at 465.

The majority it seems, needed more information before it would overrule Shutt. Three other justices, however, were willing to do so.

Justice Douglas, specially concurring, held that breath samples for defendants independent testing should be retained. He did feel that, because of law enforcements good faith reliance on *Shutt*, it should be overruled and samples kept effective February 1, 1982.

Justice Batchelor and Justice King, dissenting, also felt that *Shutt* should be overruled and a breath sample retained, but they felt that it should be effective with this decision.

Thus, *State v. Cornelius*, supra, 452 A. 2d 464, in all significant aspects, holds with *Trombetta*. Three of five justices felt that the state had a due process duty, while administering a Breathalyzer test, to take an additional breath sample for the defendant's later independent testing. Although their own opinion recognized the evidence compelling them to overrule *Shutt*, the two remaining jus-

tices were, as described in an ancient maxim, "unwilling to recognize the new moon out of loyalty to the old."

Petitioner has cited two cases which arguably conflict with *Trombetta*. The first is *State v. Larson* (N.D. 1981) 313 N. W. 2d 75 which held that due process did not require the state to preserve a sample of defendant's breath as taken at the time of a Breathalyzer test. The second is *State v. Young* (Kan. 1980) 614 P. 2d 441 where, upon being stopped for driving under the influence of alcohol, the officer had defendant blow into a kit, creating three metal compartments holding defendant's breath. The officer had those samples tested on an Intoximeter Mark IV, a gas chromatograph machine. The *Young* court held there was no duty to retain any of the compartments for defendant's later use. On close examination, the alleged conflict is insignificant.

Both courts held that law enforcement need not retain a breath sample because, by statute in both states, a suspect of driving under the influence of alcohol may request and obtain a chemical test at his own expense by a qualified physician of his choice. Section 39-20-02 NDCC; *State v. Larson,* supra, 313 N. W. 2d at 753, K. S. A. 8-1004; *State v. Young,* supra, 614 P. 2d at 446.[2] The courts found that this provided the defendant with all the due process to which he was entitled.

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[2]A second question in this case was the duty to preserve the Breathalyzer ampoule. The court found that there was insufficient evidence on the issue of how later testing of that ampoule could benefit the defendant. *People v. Larson,* supra 313 N. W. 2d at 754. Also, the utility and feasibility of preserving this ampoule differs greatly from that of retaining a breath sample, the issue in *Trombetta*. See *State v. Young,* supra 614 P. 2d at 445, 446. The *Larson* courts holding on this second question cannot conflict with *Trombetta*.

This precise argument was made and rejected in *Trombetta* based on California Vehicle Code Section 13354 (b) allowing defendant to have an independent test at his own expense by his own expert. That section further provides that "the failure or inability to obtain an additional test by a person shall not preclude the admissability in evidence of the test taken at the direction of the peace officer." The *Trombetta* court apparently found that, as a practical matter, California Vehicle Code Section 13354 (b) is a useless due process protection for the defendants because the sample so obtained would be taken much later than the one the peace officer obtained.

The problem is clearly stated in the California case of *In re Martin* (1962) 58 Cal. 2d 509, 512, 24 Cal. Rptr. 833, where the court explained:

> "It is a matter of common knowledge that the intoxicating effect of alcohol diminishes with the passage of time; hence, the probative value of a blood test diminishes as well. In a short period of time an intoxicated person may 'sober up' sufficiently to negate the materiality of a blood test where the sample has not been timely withdrawn. (Citation)"

The same reasoning is true with a breath sample. A defendant would probably be arrested at night or during the weekend. If he decided to have an independent test he would have to wait until such time as the law enforcement officers would allow him to do what was necessary to obtain one. He would then have to find an expert. He would then have to either arrange to meet that expert at the jail or wait until his release to go and meet the expert. It would take hours before this could all be arranged and the test actually administered. Furthermore, all this assumes that the defendant would have at

that moment the financial resources to retain these expensive experts. If the defense experts sought to testify at trial, the People would challenge the probative value and admissibility of that test on the ground that the defense sample was taken much later than the sample which the police officer took.

Whatever due process these independent testing provisions afford suspects in Kansas and North Dakota, they are useless in California, as the *Trombetta* court realized. California Vehicle Code § 13354(b) is as likely to give birth to due process as a cow is to give birth to a colt.

Concluding then, there is no significant interstate conflict on the issues raised in *Trombetta*, and there is no need for the United States Supreme Court to grant this petition on that consideration. (United States Supreme Court Rule 17.1(a))

The Trombetta Decision Is An Application Of Principles Of Due Process First Set Out By This Court In Brady v. Maryland (1963) 373 U.S. 83, 83 S. Ct. 1194.

Petitioner erroneously argues that this petition need be granted because the *Trombetta* decision resolved a Federal question of law in a manner which conflicts with applicable decisions of the United States Supreme Court, mentioning particularly the case of *Brady v. Maryland* (1963) 373 U. S. 83, 83 S. Ct. 1194. United States Supreme Court Rules, Rule 17.1(c). Rather than conflicting with *Brady* as petitioner suggests, the *Trombetta* decision judiciously applies *Brady* to the *Trombetta* facts.

In the *Brady* decision, this court explained:

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution.
>
> The principle of *Mooney v. Holohan* is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair. . . ." Id. at 87.

Petitioner is not seriously contending that *Brady* was not followed in *Trombetta*. Rather, petitioner is once again disputing factual matters resolved by the *Trombetta* court, particularly regarding the feasibility of retaining a breath sample and the utility of that sample to a defendant on retesting. The United States Supreme Court does not grant certiorari to review evidence and discuss specific facts. *United States v. Johnson* (1924) 268 U. S. 220, 227. As is discussed below, that is what petitioner seeks in all areas he contends *Trombetta* is inconsistent with *Brady*.

Petitioner first argues that if the Omicron Intoxilyzer is the breath testing device used, the breath is never possessed. Because decisions of this court, including *Brady*, do not require law enforcement to preserve anything it does not possess, petitioner contends there is no due process violation by law enforcement in not retaining a sample. Petitioner cites *People v. Miller* (1975) 52 C.A. 3d 666, 125 Cal. Rptr. 341 and *State v. Young* (Kan. 1980) 614 P. 2d 441.

The case of *State v. Young*, supra, 614 P. 2d 441 recognized that the prosecution *did* possess a breath sample. The breath was possessed in each of the three compart-

ments created by operation of the kit. The language quoted by the Kansas case recognizes, as we do here, that because no attempt whatsoever was made to retain the sample "possessed," it did not exist when defendant requested it. This does not assist petitioner.

People v. Miller, supra, 52 Cal. App. 3d 666 is the case that *Trombetta* all but overruled almost exclusively on this factual issue concerning collection and possession.

> "The *Miller* court determined that 'Hitch [People v. Hitch (1974) 12 Cal. 3d 641] merely holds that evidence which the prosecution once possessed must be held. The test by intoxilyzer . . . may have gathered evidence in the sense of placing the breath in the chamber but it was not evidence of which the government could 'take possession.' The only element reducible to possession was the printout card which has been preserved. (citation)
>
> We disagree fundamentally with the *Miller* characterization of what happens when a breath sample is taken. That is, in our view, such a taking is a collection of evidence within the Hitch rationale. The question then is whether the specimen may be exhausted in testing without taking available steps to obtain and preserve another specimen for retesting." (brackets added) *People v. Trombetta,* supra, 142 Cal. App. 3d at 143, 144.

On the possession issue, the *Miller* court is inaccurate. As with blood and/or urine testing, California has extensive statutory and administrative procedures for the testing of breath for alcohol content. As with blood and/or urine, law enforcement officers take a specimen, and, by the use of some testing device, determine the alcohol content contained therein. Though a breath sample may be difficult to see or touch, it is specious to suggest it is

not "possessed." If the blood or urine sample was thrown away following testing, it is difficult to imagine the Attorney General arguing that it was not possessed. It is by virtue of this faulty reasoning that *Miller* is no longer the law in California. Where law enforcement seeks to determine through testing the blood-alcohol content of the breath of a suspect under arrest for driving under the influence of alcohol, law enforcement possesses breath as much as they can possess urine and blood. How could Petitioner have measured alcohol in breath he didn't possess?

If *Trombetta* held that due process required law enforcement to save and preserve for the defendant evidence they never possessed, respondents agree there would be a significant conflict with existing decisions of this court. No such holding was rendered and therefore there is no conflict.

Secondly, petitioner contends that *Trombetta* requires law enforcement to take affirmative steps to gather evidence for the accused. This holding, petitioner argues, conflicts with *Brady* and thus requires clarification by the United States Supreme Court.

Trombetta does not so hold. It merely holds that, as part of law enforcement's federal due process duties to preserve evidence they have gathered and intend to use against the defendant (here, the breath of the defendant), they must retain a breath sample. *Trombetta* does not require law enforcement to gather evidence, but only to preserve that which it has collected, possessed, tested and intends to use against the defendant. In petitioner's argument, he again relies on *People v. Miller*, supra, 52 C. A.

3d 666 and *State v. Young*, supra, 614 P. 2d 441. As argued above, these cases are not controlling.

Thirdly, petitioner argues that California Vehicle Code § 13354 (b), which allows a suspect arrested for driving under the influence of alcohol to obtain an expert of his choice at his own expense, provides that suspect with all due process to which he is entitled. As previously discussed in respondents' brief in opposition, the *Trombetta* court found that section does not provide such a suspect with due process.

Next, petitioner urges that the duty to preserve under *Brady* does not arise because in *Trombetta* it was not proven that a practical means of preservation exists which permits a reliable retest. (Petition, page 23) Unbelievably, petitioner states: "The California Court of Appeal refused to address the issue." (Petition, page 24) There may well never be another court which had as much information on that issue as the *Trombetta* court. In addition to the record from the four trial courts, because respondents Ward and Berry were before the *Trombetta* court on Habeas Corpus, additional evidence on the issue was introduced at the appellate level. This included declarations from the leading experts on breath retention devices on the West Coast.

In addition, by letter of May 14, 1982, to all counsel from the clerk of the *Trombetta* court, the court vacated the submission and asked counsel to provide letter briefs on two issues. The first issue was: "Is it feasible to require breath samples to be preserved when an Intoxilyzer is used?" The second question was: "Would later testing of such a sample yield useful results?" After all par-

ties and amicus responded, the matter was resubmitted and the decision rendered.

On an extensive record, the *Trombetta* court found that it is feasible to preserve breath samples and that upon retesting, the results thereof are useful. The court found that there are available steps to collect and preserve a breath specimen for retesting. The court agreed with the reasoning of the Colorado Supreme Court in *Garcia v. District Court,* supra, 589 P. 2d 924 and the finding by that court that the breath could have been preserved and that the failure of the state to collect and preserve evidence, when those acts can be accomplished as a mere incident to a procedure routinely performed by state agents, amounts to suppression of that evidence.

Petitioner insists that the Advisory Committee on Alcohol Determination, California Department of Health, concluded at a meeting that no device currently exists which would permit a reliable retest of a breath sample. (Petition, page 26)

The *Trombetta* court had before it and relied on overwhelming contrary evidence on the reliability of breath sample retesting. Furthermore, this "recommendation" was first presented to the *Trombetta* court by two unsolicited letters from Deputy Attorney General Charles R. B. Kirk. It may be significant to note that counsel for respondent Trombetta had to inform the *Trombetta* court that Mr. Kirk was wearing two hats. At the time the recommendation was made and the *Trombetta* court informed of it by Mr. Kirk, he was also a member of the committee that authored the recommendation.

Furthermore, it was not the recommendation of the Advisory Committee itself, but of an Ad Hoc Committee

to the Advisory Committee. Finally, the Department of Health did not and has not adopted the recommendation and the kit continues to be a state-approved device.

Again, petitioner is requesting that the United States Supreme Court review a factual dispute which, based on an extensive record, the *Trombetta* court decided against him. The request should be denied.

Oddly, the case petitioner relies on most heavily in the petition, *State v. Young* (Kan. 1980) 614 P. 2d 441, effectively lays to rest any contention that the kit does not provide a sample which could yield reliable results on retest. The device in that case which law enforcement used was the kit.[3] If the kit provides reliable results to law enforcement in Kansas, it can do the same for a defendant in California.

Concluding, *Brady* required that, to comply with federal due process, evidence favorable to an accused may not be suppressed, irrespective of the motives for so doing if the evidence is material to either guilt or punishment. *Brady v. Maryland, supra,* 373 U. S. at 87. Cases following *Brady* have held that this duty holds whether the evidence is clearly exculpatory or simply may have been. In J. Skelly Wright's decision of *United States v. Bryant* (D. C. Cir. 1971) 439 F. 2d 642, he explained:

> "Were *Brady* and its progeny applicable only when the exact content of the non-disclosed materials was known, the disclosure duty would be an empty promise, easily circumvented by suppression of evi-

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[3]The *Trombetta* court focused on the kit. There was also evidence before it of other devices also capable of preserving a breath sample useful to defendant on retest. None of these devices have yet been approved by the State.

dence by means of destruction rather than mere failure to reveal. The purpose of the duty is not simply to correct an imbalance of advantage, whereby the prosecution may surprise the defense at trial with new evidence; rather, it is also to make of the trial a search for truth informed by all relevant material, much of which, because of imbalance in investigative resources, will be exclusively in the hands of the Government." Id. at 648

The *Trombetta* court, following exhaustive briefing, oral argument and taking of evidence, found that law enforcement could easily retain and preserve a sample of the breath it had taken from the accused. Further, they found this evidence would, on retesting, yield reliable results which would verify the accuracy or establish the inaccuracy of the test law enforcement had performed on the breath. Following principles of due process enunciated by the United States Supreme Court in *Brady v. Maryland,* supra, 373 U. S. 83, the *Trombetta* court held law enforcement must preserve a sample as a condition to the admissibility of their test results. On this petition, petitioner requests that the United States Supreme Court review the factual determinations made by the *Trombetta* court. The United States Supreme Court need not resolve an essentially factual matter and the respondents respectfully request the petition be denied.

Emergency Legislation, Effective September 15, 1983, Has Largely Remedied The Due Process Violations Presented To This Court.

Following the *Trombetta* decision emergency legislation was passed and California Vehicle Code § 13353.5 was amended to read, in pertinent part:

"13353.5 (a) In addition to the requirements of Section 13353, a person who chooses to submit to a

breath test shall be advised before or after the test that the breath-testing equipment does not retain any sample of the breath and that no breath sample will be available after the test which could be analyzed later by the person or any other person.

(b) The person shall also be advised that, because no breath sample is retained, the person will be given an opportunity to provide a blood or urine sample that will be retained at no cost to the person so that there will be something retained that may be subsequently analyzed for the alcoholic content of the person's blood. If the person completes a breath test and wishes to provide a blood or urine sample to be retained, the sample shall be collected and retained in the same manner as if the person had chosen a blood or urine test initially.

(c) The person shall also be advised that the blood or urine sample may be tested by either party in any criminal prosecution. The failure of either party to perform this test shall place no duty upon the opposing party to perform the test nor affect the admissibility of any other evidence of the alcoholic content of the blood of the person arrested."

Although not relevant to these proceedings, this legislation provides a modicum of due process to a suspect who elects to take the breath test which Albert W. Trombetta, et al. did not have. While this legislation may not go far enough, it is a step in the right direction and may vitiate the need, if any, for the United States Supreme Court to grant this petition.

CONCLUSION

Respondent respectfully requests this court to deny the Petition for a Writ of Certiorari.

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